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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 90.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois,

Petitioner,

vs.

THE NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. Bartlett, Deceased.

MOTION OF ELIHU ROOT, JR., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

ELIHU ROOT, JR.,
Counsel for Home Trust Company, as Amicus Curiae.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Home Trust Company, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*.

ELIHU ROOT, JR.,
Counsel for Home Trust Company
as *Amicus Curiae*.

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BRIEF OF ELIHU ROOT, JR., AS *AMICUS CURIAE.*

Statement.

Although this case involves Federal estate taxes collected in respect of seven trust agreements, this brief is concerned only with the trust created February 11, 1903 (R. 47), and is confined to a discussion of the constitutionality of the retroactive clause of Section 402 (c) of the Revenue Act of 1921 as applied to that trust (hereinafter referred to as the 1903 trust). The principles discussed in this brief also apply to the trust created December 30, 1910 (R. 49), but for the sake of simplicity only the 1903 trust will be discussed.

The decision herein as to the 1903 trust will be determinative of *Home Trust Company* v. *Bowers* and *Home Trust Company* v. *Edwards* now pending before the United States District Court for the Southern District of New York in which the writer of this brief is the attorney for the taxpayer. Those cases, like the case at bar, are suits against Collectors of Internal Revenue to recover moneys collected by them as a Federal estate tax by reason of the inclusion in the taxable estate of a decedent of the value at the date of his death of property transferred by him under a revocable trust made prior to the passage of the first Federal estate tax act in 1916. The trusts involved in the *Home Trust Company* cases were created in 1911, and they provided (like the 1903 trust in the case at bar) for the payment of the income to the donor during his life and for payment of the income and corpus to certain named persons after the donor's death. The amount of the tax in suit in the *Home Trust Company* cases is $1,165,625. The statute involved in the *Home Trust Company* cases is 402 (c) of the Revenue Act of 1918 (40 Stat. 1097) which is identical with Section 402 (c) of the Revenue Act of 1921 (42 Stat. 278) involved herein.

The material facts relating to the 1903 trust in the case at bar, as stated in the Declaration and admitted by the Collector's demurrer, are as follows:

In 1903 Mr. Bartlett (hereinafter referred to as the decedent) executed and delivered an indenture to The Northern Trust Company of Chicago, as Trustee, conveying 360 shares of stock of Illinois Central Railroad Company in trust (R. 48, 49). Under the terms of the indenture the Trustee was directed to pay the income to the decedent during his lifetime (R. 48). Upon decedent's death the

Trustee was directed to transfer the trust property to the decedent's daughter, one-half if and when she attained the age of thirty years and the other half if and when she attained the age of thirty-five years. If the daughter died before receiving all of the stock the Trustee was directed to transfer it to the appointees or, in default of appointment, the heirs at law of the daughter (R. 48). The Trustee was given the power to sell the trust property and invest the proceeds in such other dividend-bearing or interest-bearing securities as it should deem best and to hold and apply such property to the same uses as the original prop erty (R. 48). The settlor reserved the power to revoke the trust (R. 48).

The decedent died on May 30, 1922, a resident of the State of Illinois (R. 1). The Northern Trust Company was appointed executor under his will (R. 1, 2). In accordance with the regulations of the Federal tax officials then in force, the executor filed a return for estate tax purposes in which it included as a part of the gross estate of the decedent the sum of $44,194.50 being the value at the date of the death of the decedent of the property of the 1903 trust (R. 49). The Federal estate tax resulting from inclusion of the trust property in decedent's gross estate amounted to $7,955.04 (R. 49). The tax was formally assessed by the Federal tax officials, was paid by the executor, and a claim for its refund denied by the Commissioner of Internal Revenue (R. 14, 49).

The executor then sued the Collector to whom the tax had been paid, in the United States District Court for the Northern District of Illinois, Eastern Division, to recover taxes including the tax of $7,955.04 on the ground that Section 402 (c) of the Revenue Act of 1921, under which

the tax was imposed, was unconstitutional and void (R. 16, 49). The Collector demurred to the Declaration of the executor which alleged the facts above set out (R. 57, 59). The District Court held for the executor and entered judgment in its favor (R. 61). The Circuit Court of Appeals for the Seventh Circuit affirmed this decision on the ground that Section 402 (c) was unconstitutional and void (R. 66; 24 Fed. (2d) 91 (1927)). The case is before this Court following the granting of a petition of the Collector for a Writ of Certiorari to the Circuit Court of Appeals for the Seventh Circuit on April 23, 1928 (R. 70; 72 L. Ed. 499).

The Statute.

The relevant provisions of the Revenue Act of 1921 are as follows (42 Stat. 227, 277):

> "Section 401. That, in lieu of the tax imposed by Title IV of the Revenue Act of 1918, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or non-resident of the United States: [Here are listed the applicable rates.] • • •
>
> "Section 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated • • •
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a

trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death **(whether such transfer or trust is made or created before or after the passage of this Act)**, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

"Section 403. That for the purpose of the tax the value of the net estate shall be determined—[by deducting from the gross estate the items provided in this section]."

Position of *Amicus Curiae*

We maintain, first, that even if Congress could constitutionally have taxed revocable trusts created and revocable transfers made prior to the passage of the first Federal estate tax act in 1916, it did not do so in the Revenue Act of 1921. Since the retroactive clause in the statute has been held by this Court to be unconstitutional, it falls entirely. Inasmuch as there is no separate section or provision of the statute dealing with revocable trusts as distinguished from irrevocable trusts, the Act cannot be applied to revocable trusts while irrevocable trusts are exempted from its operation, without adding to the statute a limitation not now in it. In order to save the constitutionality of the remainder of the Act,—if it is constitutional—it is necessary under the settled rule established in previous decisions of

this Court, to elide the retroactive clause, i. e., to read the statute as if that clause were omitted. When this is done, the statute becomes inapplicable **as a matter of construction** to trusts created and transfers made prior to its passage, this Court having ruled in other cases that the statute is not to be given a retrospective operation unless this is expressly required by its language. And if the statute be not given a retrospective effect, it cannot apply to the 1903 trust, for there can be no doubt that the transfer under this trust occurred in 1903 and not later. The retention by the settlor of a power of revocation, unexercised, cannot, on reason and under the authorities, prevent the taking effect of the transfer. It is at most merely a condition subsequent which would make possible a retransfer.

We maintain, secondly, that even under a statute differently worded, the 1903 trust cannot constitutionally be included in the settlor's gross estate for tax purposes on his death in 1922, inasmuch as it was created in 1903 before any Federal estate tax law had been enacted. We contend that its inclusion in the gross estate of the decedent and the imposition upon that estate of a tax based upon the value in 1922 of property transferred nearly twenty years previously is an arbitrary classification and the taking of property without due process of law in violation of the Fifth Amendment. We also contend that to measure the tax—a so-called excise tax—by the inclusion in the gross estate (at its value at the date of the decedent's death) of property transferred many years previously is not to impose an excise tax but an unapportioned direct tax, which is unconstitutional.

ARGUMENT.

I.

Even if Congress could constitutionally have taxed revocable trusts created and revocable transfers made prior to the passage of the first Federal estate tax act in 1916, it did not do so in the Revenue Act of 1921.

(a) **The retroactive clause of Section 402 (c) has been held unconstitutional.**

The first Federal estate tax act was the 1916 Act. It has no express retroactive clause. It is identical with the 1921 Act here under discussion, except for the retroactive clause. This Court held that, in the absence of an express retroactive clause, the 1916 Act does not apply to trusts and transfers in contemplation of death or intended to take effect in possession or enjoyment at or after death, made or created **prior to its passage.**

> *Shwab* v. *Doyle*, 258 U. S. 529 (1922);
> *Union Trust Co.* v. *Wardell*, 258 U. S. 537 (1922);
> *Levy* v. *Wardell*, 258 U. S. 542 (1922).

The 1918 Act contains a clause expressly retroactive. It requires the inclusion in the taxable estate of every decedent dying after the passage of the Act of all property transferred by the decedent during his lifetime "whether such transfer or trust is made or created before or after the passage of this Act".

In *Nichols* v. *Coolidge*, 274 U. S. 531 (1927), this Court held the retroactive clause unconstitutional, saying at page 542:

> "And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent **prior to its passage** merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

Section 402 (c) of the 1921 Act, here under discussion, is identical with Section 402 (c) of the 1918 Act. Under the decision in *Nichols* v. *Coolidge*, therefore, the retroactive clause in Section 402 (c) of the 1921 Act is unconstitutional and void.

In *Nichols* v. *Coolidge*, this Court expressly held open the question of whether Section 402 (c) is constitutional as applied to trusts created and transfers made **after** the passage of the Statute, saying in its opinion at page 543:

> "Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider."

If the remainder of Section 402 (c) of the 1921 Act, applying to trusts created and transfers made **after** the passage of the first Federal estate tax act, is to be upheld, only two possible courses are open to this Court:

(1) The Court might conceivably introduce a modification in the retroactive clause which would limit the scope of the Section to revocable transfers. But, as will now be pointed out, this Court has repeatedly refused to exercise such a legislative power and, in effect, to amend an Act of Congress.

(2) The retroactive clause might be elided and the Statute read as if the retroactive clause were eliminated. If this were done the Statute would become like the 1916 Act, which, as above stated, has been held by this Court to apply only to trusts created and transfers made **after** 1916. The 1903 trust would not then be included in the taxable estate.

(b) **If modifications or limitations must be inserted or implied in an unconstitutional clause in an Act of Congress in order to avoid the fatally broad effect of the language of the clause, the entire Act, or the section containing the clause, must be held void; but if the elision of the clause will leave a consistent and workable Act, the remainder of the Act may be held valid.**

When an Act of Congress has been held unconstitutional in part, the remainder cannot be upheld unless it is embodied in a "separate section or provision" which will be workable despite the elision of the unconstitutional provision.

This is illustrated by the case of *Hill* v. *Wallace*, 259 U. S. 44 (1922). This Court there held that Section 4 of the Future Trading Act of 1921, imposing a tax per bushel on certain contracts for the sale of grain for future delivery, was unconstitutional. The question then arose as to whether other sections in the statute were so distinct from Section 4 that they could be upheld under a provision in the Act to the effect that "if any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby". The Court held

these other sections of the statute invalid, stating, at page 71:

> "undoubtedly such a provision [the saving provision just quoted] furnishes assurance to courts that they may properly sustain **separate sections or provisions** of a partly valid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act."

In the Revenue Act of 1921 there is no "separate section or provision" providing for taxation of revocable transfers made prior to the passage of the Act. Under the statute, all transfers made prior to the passage of the Act, whether revocable or irrevocable, are placed in one class and are included under the general language "whether such transfer or trust is made or created before or after the passage of this Act." Nowhere in the statute is there a separate classification of revocable and irrevocable transfers.

In order for the Court to uphold the tax on revocable transfers made prior to the passage of the Act, it would be necessary to insert or imply a limitation in the retroactive clause. This the Court will not do.

The latest pronouncement of this Court to that effect is in the case of *Yu Cong Eng* v. *Trinidad, Collector*, 271 U. S. 500 (1926). It there appeared that the Philippine Legislature had passed an Act known as the Chinese Bookkeeping Act. This Act provided:

> "It shall be unlawful for any person, company, partnership or corporation engaged in commerce, industry or any other activity for the purpose of profit in the Philippine Islands, in according with

> existing law, to keep its account books in any language other than English, Spanish, or any local dialect."

The Government admitted that the Act, if literally interpreted to make it unlawful to keep account books in any language other than English, Spanish, or local dialect, probably would be unconstitutional. The Government, therefore, contended that the Act, in view of the history of the legislation, should be interpreted to require only the keeping of such books as were necessary in order to facilitate Government inspection for tax purposes, in English, Spanish or a local dialect. The Court held that, even if the construction sought by the Government would make the Act constitutional, the Act could not be so construed.

At page 518, the Court said:

> "The main objection to the construction given to the Act by the court below [the construction sought by the Government] is that, in making the Act indefinitely mandatory instead of broadly prohibitory, it creates a restriction upon its operation to make it valid that is not in any way suggested by its language. In several cases this Court has pointed out that such strained construction, in order to make a law conform to a constitutional limitation, can not be sustained.
>
> In *United States* v. *Reese*, 92 U. S. 214, the question for decision arose on a demurrer to an indictment against inspectors of municipal election for refusing to receive and count the vote of a colored man. The power of Congress to forbid such an act was confined under the Fifteenth Amendment to a refusal to receive such a vote from a colored man on account of his race, color or previous condition of servitude, but the section under which the indictment

was brought did not specifically confine the offense to a refusal for such a reason or to such discrimination, although in previous sections of the Act there was a general purpose disclosed in the Act to enforce the Fifteenth Amendment. The demurrer was sustained on the ground that the section was invalid.

Chief Justice Waite, in delivering the opinion of the Court, said, at p. 221:

'We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

'It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to

> some extent, substitute the judicial for the legislative department of the government.'
>
> And again the Chief Justice said:
>
> 'To limit this statute in the manner now asked for would be to make a new law, not to enforce the old one. This is no part of our duty.'
>
> The same principle was laid down, and this language approved by this Court, in the *Trade Mark Cases*, 100 U. S. 82, in which, to save the validity of a general statute providing for trade marks, the Court was asked to construe the statute to apply only to trade marks in interstate commerce."

Another case cited by the Court is *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126 (1913), in which the plaintiff brought a suit under the Federal Civil Rights Act of 1875 to recover damages for having been refused accommodations by a public carrier. The Civil Rights statute prohibited certain acts "within the jurisdiction of the United States." This clause had previously been held unconstitutional as applied to acts which took place in a state. The question then arose as to whether the clause could be upheld by limiting its application to acts which took place upon the high seas and in the District of Columbia and Federal territories. The Court held that, even though Congress could have constitutionally made the Act apply to acts upon the high seas and in the District of Columbia and Federal territories, it was impossible so to limit the statute.

The Court stated, at page 138:

> "Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, 'within the jurisdiction of the United States,' which alone indicate where the sections are to be operative."

And at page 135, the Court stated:

> "So here, to give to the sections in question the effect suggested it would be necessary to reject or strike out the general words 'within the jurisdiction of the United States,' whereby Congress intended to declare and define in what places the sections should be operative, and to insert other and new words restricting their operation to American vessels upon the high seas and to the District of Columbia and the Territories. To do this would be to introduce a limitation where Congress intended none and thereby to make a new penal statute, which, of course, we may not do."

In *Baldwin* v. *Franks*, 120 U. S. 678 (1887), the rule was stated as follows by this Court at page 685:

> "In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute * * * provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens. * * * The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

The same rule has been forcefully stated by this Court in the following cases:

The Employers' Liability Cases, 207 U. S. 463, 500 (1908);

Illinois Central R. R. v. *McKendree*, 203 U. S. 514, 529 (1906).

The Collector in the case at bar endeavors to have this Court do exactly the thing which it has many times condemned and refused to do, as shown by the cases just discussed. The Collector would have this Court insert in the retroactive clause some limitation or modification which would allow the taxation of revocable transfers and trusts made or created prior to 1916, while exempting irrevocable transfers and trusts so made.

But in Section 402 (c) of the 1921 Act, Congress makes no distinction between revocable and irrevocable transfers created prior to 1916. The retroactive clause speaks only of transfers or trusts "intended to take effect in possession or enjoyment at or after death," "whether such transfer or trust is made or created before or after the passage of this Act." To uphold the tax in respect of revocable trusts while exempting irrevocable trusts would be to make a distinction and create a classification which Congress did not make. It would be to separate transfers which are not even separately mentioned in the Act. It would be not an interpretation of the Act, but an act of legislation by this Court.

As showing, further, that Congress in the Act of 1921 did not intend separately to classify revocable and irrevocable transfers made prior to the passage of the Act, it should be noted that in the Revenue Act of 1924, Congress for the first time did separately classify revocable transfers.

In addition to the section which corresponds to Section 402 (c) of the 1921 Act, the following section appears in the 1924 Act as Section 302 [43 Stat. 304]:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke,"

It has often been decided by this Court that when the later of two revenue acts expressly taxes a given class for the first time, the earlier act will be interpreted not to tax that class. The later act is regarded as an addition to, and not a clarification of, the earlier act. *Shwab* v. *Doyle*, 258 U. S. 529, 536 (1922).

Applying the reasoning of these cases to the point now under discussion, the express **separate classification** for the first time of revocable and irrevocable trusts made by the 1924 Act is corroborative of the otherwise indubitable fact that no such separate classification was made or intended by the 1921 Act.

(c) **In order to save the remainder of Section 402 (c), the retroactive clause must be elided.**

We have pointed out above that it is not possible under the decisions of this Court to modify the retroactive clause of Section 402 (c) and apply it only to revocable transfers made prior to the passage of the Act.

If Section 402 (c) is to be sustained as applied to transfers made after the passage of the Act, it is necessary to elide the retroactive clause: "whether such transfer or trust is made or created before or after the passage of this Act". This method of separating the void from the valid is the only means available, under the wording and construction of the statute and the decisions discussed above, of saving the remainder of the Section.

The Circuit Court of Appeals for the 6th Circuit, in *Roberts* v. *Atlantic Oil Producing Co.*, 295 Fed. 16 (1924), (certiorari denied, 265 U. S. 582), in an instructive opinion which reviews the cases, points out that the elision of the objectionable words is the sole and necessary method of sustaining, in its valid portions, a partially invalid statute. The Court said (p. 18):

> "From a review of all the Supreme Court decisions, we think it may safely be said * * * that if we find that a mere elision of those words, or even sections, which give an unconstitutional effect, will leave a consistent and workable act, this remainder will be held valid; while if * * * modifications or limitations must be inserted or understood, to avoid the fatally broad effect of the statutory language, the whole act must fail. In other words, we may strike out the excess, but may not add a limitation."

Since Section 402 (c) does not separately classify **revocable** trusts made prior to the statute on the one hand, and **irrevocable** transfers made prior to the statute on the other hand, and since Section 402 (c) has been held by this Court to be unconstitutional as applied to irrevocable transfers made prior to the enactment of the statute, it is submitted that this Court should not, under the decisions,

uphold the tax on the 1903 trust in the case at bar. The retroactive clause must be elided. We shall now point out that when this is done, the Act will be construed not to include the 1903 trust.

(d) **With the retroactive clause of Section 402 (c) of the 1921 Act elided, the section becomes inapplicable as a matter of construction to trusts, revocable or irrevocable, created prior to the passage of the first Federal estate tax act, and therefore inapplicable to the 1903 trust.**

When the retroactive clause is elided from the statute, the most that the Collector can claim is that the Federal estate tax may be levied in respect of trusts created and transfers made **after** the passage of the first Federal estate tax act in 1916. This follows from the decisions in *Shwab* v. *Doyle*, 258 U. S. 529 (1922); *Union Trust Co.* v. *Wardell*, 258 U. S. 537 (1922); *Levy* v. *Wardell*, 258 U. S. 542 (1922); in all of which this Court held that the 1916 Act, which was like the 1921 Act except that there was no retroactive clause, was to be construed to apply only to transfers and trusts made **after** the passage of the act. This Court said in *Shwab* v. *Doyle*, at page 537:

> "And this, we repeat, is in accord with principle and authority. It is the proclamation of both that a statute should not be given a retrospective operation unless its words make that imperative and this cannot be said of the words of the Act of September 8, 1916."

If the statute be not given a retrospective effect, it can not apply to the 1903 trust, for there can be no doubt that the transfer under this trust occurred in 1903 and not later. That is settled by the authorities. We do not cite them

here because they are fully set forth under Point II of this brief (pages 24-33).

To summarize this point:

If there were in the Statute two retroactive clauses, one purporting to apply to irrevocable trusts and one purporting to apply to revocable trusts, one might argue that the former was void, and still argue that the latter was valid despite Nichols v. Coolidge. But there are not two retroactive clauses. There is but one. The same words purport to apply to ALL trusts. The self-same words cannot be held sometimes valid and sometimes invalid. They have been held invalid by this Court in a case involving an irrevocable trust. They are invalid then always in the 1921 Act. They are null and void and they are to be elided from the Statute and without them the Statute becomes like the Statute of 1916, which has been held to apply only to trusts created after the passage of the Act. The 1903 trust, which was created before the passage of the first Federal estate tax act, was therefore wrongly included in the settlor's taxable estate.

II.

The 1903 trust cannot constitutionally be included in the taxable estate of the decedent.

In the preceding portion of this brief we have shown that, even if the tax in respect of the 1903 trust could constitutionally be laid, that has not been done in the 1921 Act. We further maintain that, even if the statute were so drawn as separately to classify revocable and irrevocable trusts

(which it is not), the tax in respect of the 1903 trust would nevertheless be an unconstitutional exaction. The remainder of this brief is devoted to a statement of the reasons and authorities which support this conclusion.

(a) The decision of this Court in Nichols v. Coolidge, 274 U. S. 531 (1927), is determinative of the case at bar.

In *Nichols* v. *Coolidge* it appeared that the decedent and her husband had executed and delivered to trustees a deed of trust in 1907. The trustees were directed to pay the income from the trust property to the settlors, then to the survivor, and after the death of the survivor to distribute the corpus among the settlor's children or their representatives. The trustees were authorized to sell the property and to make and change investments. In 1917 the settlors assigned to the children their entire interest in the property. Upon the death of the survivor the Commissioner of Internal Revenue held that under Section 402 (c) of the Revenue Act of 1918, the trust property transferred in 1907, at its value on the date of the death of the survivor, must be included in her taxable estate. Accordingly, a tax was assessed on her estate including the trust property valued at the date of the survivor's death, and the executors of the survivor sued to recover the amount of tax paid by reason of the inclusion of the trust property in her taxable estate. Section 402 (c) of the 1918 Act is identical with Section 402 (c) of the 1921 Act.

This Court held for the executors on the ground that, since the trust was created prior to the passage of the Act, the trust property could not constitutionally be included in the taxable estate. The Court pointed out the whimsical and burdensome character of the tax in the following language at page 542:

"Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See Frew *v.* Bowers, 12 Fed. (2d) 625. * * * And we must conclude that §402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property **transferred by a decedent prior to its passage** merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

The presence of a power of revocation in the 1903 trust deed in the case at bar, is the only fact which can be relied upon by the Collector to distinguish the case at bar, so far as the 1903 trust is concerned, from *Nichols* v. *Coolidge*. The presence of this power of revocation cannot destroy the fact that the trust property was **transferred prior to the passage** of any Federal estate tax act. Within the decision of this Court in *Nichols* v. *Coolidge*, therefore, the transfer under the 1903 trust deed was made, with respect to the passage of a Federal estate tax act, "**by a decedent prior to its passage**".

It is universally held that the existence of a power to revoke does not affect the efficacy or impair the legal effect of a transfer.

Among the many cases to this effect are:

People v. *The Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662 (1919);

Dolan's Estate, 279 Pa. St. 582 (1924);

Stone v. *Hackett*, 12 Gray (Mass.) 227 (1858);

Jones v. *Clifton*, 101 U. S. 225 (1879);

Frick v. *Lewellyn*, 298 Fed. 803 (Dist. Ct. W. D. Pa. 1924), aff'd 268 U. S. 238 (1925);

Stark v. *United States*, 24 Fed. (2nd) 237 (Dist. Ct. S. D. Ohio, W. D. 1927);

Hill v. *Nichols*, 18 Fed. (2nd) 139 (Dist. Ct. D. Mass., 1927);

Reinecke v. *The Northern Trust Co.*, 24 Fed. (2nd) 91 (C. C. A. 7th Cir. 1927);

The Farmers' Loan and Trust Co. v. *Bowers*, decided by C. C. A. 2nd Cir., Nov. 12, 1928, and not yet reported.

The legal effect of the 1903 trust is, of course, governed by local law. The law of Illinois is settled to the effect that the reservation by a settlor of a power of revocation does not prevent an effective transfer on the date of the execution and delivery of a deed of trust. In *People* v. *The Northern Trust Co.*, 289 Ill. 475, 124 N. E. 662 (1919), the Illinois Court had under consideration the question of whether property transferred *inter vivos* prior to the passage of the tax statute by a settlor who retained a power of revocation could be included in the settlor's taxable estate as a trust "intended to take effect in possession or enjoyment" at or after the settlor's death. The Court held that the trust property should not be so taxed and said at page 481:

"This character of deed, with such a power of revocation, has long been recognized by our law as a proper mode of an ancestor deeding his property to his children and of protecting them in the use and enjoyment of the same. All well-skilled and far-seeing lawyers, advising for the benefit of their clients, usually suggest the insertion of such a clause of revocation, and no court, so far as we know, has ever declared that such a deed is testamentary in character, or is to be held to take effect only after death, by reason, alone, of such a clause of revocation. In fact it is not possible for such a clause to have such effect. As a matter of fact, such a deed takes effect at once and continues in full force and effect until actually revoked. If revoked, it can only be revoked during the life of the grantor, and if he does not call into effect such power of revocation during his lifetime it continues in full force and effect forever after his death. If he revokes the deed under such a power the deed becomes a nullity and the title will be reinvested in the settlor by deed of reconveyance by the trustee."

The rule is the same in other states. In *Dolan's Estate*, 279 Pa. St. 582 (1924), the Pennsylvania Supreme Court had under consideration the same question as that in the *Northern Trust Company* case and held that the property transferred in trust could not be included in the settlor's taxable estate since the transfer was effective at the date of execution and delivery of the trust deed. The Court said at page 589:

"The estate in the children was fixed and definite. The annexation of the power of revocation does not affect the grantee's power of enjoyment or prevent the sale of the property privately or judicially,

though the grantee takes the estate with the possibility of its being divested by the happening of an uncertain event, to wit, the exercise of the power of revocation. Through the exercise of that right reserved, the property may be recalled. But the right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or estate granted; to all intents and purposes, title and possession pass just as effectively as any deed or grant could make it, continuing in that state so long as the power of revocation lies dormant.

"An attempt has been made to liken the present deed to that in Matter of Bostwick, 160 N. Y. 489; 55 N. E. 208. The facts in the two cases are not similar. If they were, and the decision had the effect claimed by appellant, we would not hesitate to restate as the law that which this court has always recognized, to wit, the power of revocation in a deed is equivalent to the power of appointment; neither prevents the passing of title or the complete enjoyment of the thing granted. * * *

"How, then, could the extinguishment of the power to revoke the deed of trust by the death of Mrs. Dolan,—that is all death accomplished,—work a transfer of property? The right of revocation, standing alone, is not tantamount to a property right in the settlor; it possesses none of the attributes of property. Mrs. Dolan did everything possible in 1908 to divest herself of the specific property. When she died in 1920 there was nothing for her, the law, or any one to do to complete the act. Revocation is neither an estate nor property, and cannot pass at death."

In *Stone* v. *Hackett*, 12 Gray 227 (1858), the Massachusetts Supreme Judicial Court stated at page 232:

> "A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it."

This Court has also recognized that a power of revocation does not prevent a transfer taking effect at the time of execution of a trust deed. In the leading case of *Jones* v. *Clifton*, 101 U. S. 225 (1879), the Court held that although a deed of trust contained a power of revocation, the ownership of the property which was the subject of the trust passed to the transferee and that the property could not be attached by the donors' creditors. At page 229 the Court stated:

> "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, such reservations are usual in family settlements, and are intended 'to meet the ever-varying interests of family connections'. *Riggs* v. *Murray*, 2 Johns. (N. Y.) Ch. 565. So frequent is the necessity of a change in the uses of property thus settled, arising from the altered condition of the family, the addition or death of members, new occupations or positions in life, and a variety of other causes which will readily occur to every one, that the absence of a power of revocation and of appointment to other uses in a deed of family settlement has often been considered a badge of fraud, and, except when made solely to guard against the extravagance and imprudence of the settlor, such settlements have in many instances been annulled on that ground. * * * The

> title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will."

The lower federal courts, following *Jones* v. *Clifton*, have reached the same conclusion. Thus in *Frick* v. *Lewellyn*, 298 Fed. 803 (Dist. Ct. W. D. Pa. 1924), affirmed 268 U. S. 238 (1925), the Court said at page 810:

> "And, finally, I am of opinion that in the three policies in which the assured reserved a right to revoke the assignments to his wife and daughter, but never did so, the rights of the assignees were vested and absolute; that those rights vested immediately under the assignment, subject to a limitation, not a conditional estate, vesting at the time of death, but an estate which vested at once, subject to be divested by the happening of an uncertain future event. As that event did not occur, there was no divestiture."

A similar question was presented in *Stark* v. *United States*, 24 Fed. (2d) 237 (Dist. Ct. S. D. Ohio, W. D. 1927) where the Court said at page 238:

> "It is contended that by reason of the reservation to the settlor of full power of modification and ratification, and of full control over management of the trust as well as of the benefit of all income for life, no transfer was actually made, in substance and effect, but the agreement constituted the so-called trustee as practically nothing but a custodian or agent for the management of such portion of the decedent's estate. This is but to deny the fact of transfer and existing trust, for the reason that it was within the settlor's power to undo what had been done. • • • We are also of the opinion that the retention of a

> life interest in the income of the securities by the donor, of his control of investments and management of the trust, and of his right to change the trustee, considered either separably or in connection with the power of modification, alteration, and revocation, do not negative or prevent the actual creation of the trust, or the fact that at the death of the donor the property so transferred and conveyed in trust passed under the deed of trust the interests which were created in 1915."

In *Hill* v. *Nichols*, 18 Fed. (2d) 139 (1927), it appeared that the settlor had set up a trust in 1905 which provided that the net income, or as much of it as settlor should direct, was to be paid to the settlor during his life, any balance to be added to the principal. The settlor also reserved the power at any time to revoke the trust. The settlor died after the passage of the 1918 Revenue Act. The Federal tax officials held that under Section 402 (c) of the 1918 Act the value of the trust property at the time of the death of the settlor should be included in the gross estate of the decedent. The executors of the decedent sued to recover the amount of the tax assessed by reason of the inclusion in the gross estate of the value of this trust property. The Court held for the executors on the ground that the tax was so arbitrary and capricious as to be unconstitutional, and stated at page 140:

> "I am willing to accept the argument of the Government that Congress, having the power to tax an estate of a deceased person, may measure the tax by any standard which bears a reasonable relation to the subject and is not arbitrary. • • • But I cannot go with it to the extent of regarding as reasonable a measure which includes the value at time of his

death of property of which the decedent has completely divested himself years before the act imposing the tax was enacted. * * * The effect of the assessment by the defendant, now assailed, is to measure the tax upon the testator's estate, not only by the value in 1920 of property which, prior to 1907, he had conveyed away, but also by approximately $2,700,000 of income which had accrued to the trustees, and which, by virtue of the terms of the trust instrument, became a part of the principal of the trust fund. In none of this property did the testator have any interest, legal or equitable, at the time of his death. Such a standard of measurement is both arbitrary and unreasonable. * * * the fact that the settlor reserved until 1919 the right to receive the income, and also the right to alter or terminate the trust, is not, in my opinion, sufficient to bring this trust within that reasonable relation to the subject of the tax which is necessary in order to render the measure a reasonable one. Frew *v.* Bowers, *supra*.

"The power of revocation has no effect upon the validity of the trust or the rights of the trustee, if the power is never exercised. Stone *v.* Hackett, 12 Gray (Mass.) 227; Jones *v.* Clifton, 101 U. S. 225, 25 L. Ed. 908.

"The power is not an interest in property which can pass by will or intestate laws. Jones *v.* Clifton, *supra*; Dolan's Estate, 279 Pa. 582, 124 A. 176. * * * As stated above, I am unable to distinguish this case, in principle, from Coolidge *v.* Nichols, *supra*, [4 Fed. (2d) 112], and I am compelled to the same conclusions reached in that case."

The Government took no appeal from this decision, although the case involved a very large tax.

In *The Farmers' Loan and Trust Co.* v. *Bowers*, decided by the Circuit Court of Appeals for the 2nd Circuit November 12, 1928, and not yet reported, the Court unanimously held that property transferred in trust prior to the passage of the first Federal estate tax act, the trust in that case being revocable by the donor with the consent of the trustee (who was subject to removal at any time by the donor), could not constitutionally be included in the donor's taxable estate. The Court said in its opinion:

> "A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2nd) 139; *Reinecke* v. *The Northern Trust Co.*, 24 Fed. (2nd) 91; *In re Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it."

As the Circuit Court of Appeals said in its opinion in the case at bar (24 Fed. (2d), 91, at page 93):

> "The 1903 and 1910 trusts were created many years before there was any statute of the kind here involved, and, under the authority of Jones v. Clifton, 101 U. S. 225, 25 L. Ed. 908, we hold that the title and the possession of the property passed out of the settlor, and that, as the right to revoke was not a property right in him, there was nothing that passed from the settlor, at his death, either to the beneficiaries or the trustees."

The retention of a power of revocation does not make the transfer testamentary in character. There are essen-

tial differences between a testamentary transfer and a revocable transfer made *inter vivos*. A testamentary disposition does not in any sense divest the maker of the will of title to his property. The property remains liable for his debts. If he has real property and marries after making the will his wife acquires dower rights in the property regardless of the fact that the will has been made. If, on the other hand, a transfer has been made *inter vivos*—although a power of revocation is retained—the ownership of the property is passed to the transferees, and apart from statute the property cannot be seized by the donor's creditors. *Jones* v. *Clifton*, 101 U. S. 225 (1879). If the donor subsequently marries, his wife will have no dower rights in real property so transferred. *Stone* v. *Hackett*, 12 Gray (Mass.) 227 (1858).

The power of revocation is not an interest in property. This Court so stated in *Jones* v. *Clifton*, *supra*, p. 230:

> **"The title to the land and policies passed by the deed; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will."**

The estate taken by the donees is a vested estate although it may be revoked and be divested on a condition subsequent. As the District Court said in *Stark* v. *United States*, 24 Fed. (2nd) 237 (1927), at p. 238:

> **"Estates of the remainderman vest subject only to the power in the donor to divest such estates, which power was never exercised."**

From the cases cited in this point in our brief, the well settled rule appears that the reservation of a power of revocation by the grantor of a deed does not prevent the deed

from taking effect or the property from passing to the grantee, at the date of execution and delivery of the deed. The grantee receives a vested interest subject only to be divested by the exercise of the power of revocation. It follows that the transfer in the case at bar took place at the time the trust deed was executed and delivered in 1903. Any attempt, therefore, to tax this transfer under Section 402 (c) of the 1921 Revenue Act is unconstitutional under the decision of this Court in *Nichols* v. *Coolidge*, *supra*:

> "Section 402 (c) * * * in so far as it requires that there shall be included in the gross estate the value of property **transferred by a decedent prior to its passage** merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation."

When the Court made this declaration, the case of *Jones* v. *Clifton*, *supra*, and the other cases discussed under this point, to the effect that the reservation of a power of revocation in a deed does not prevent the transfer of the property described in the deed, were well recognized and settled law.

Moreover, the same reasoning which applies to a transfer where no power of revocation is retained, applies to the taxation of the transfer in the case at bar. Prior to the passage of the statute the settlor had exercised his privilege of transferring a remainderman's interest in certain property to his daughter. When he did so, there was no Federal tax on the exercise of this privilege. After the passage of the Federal estate tax statute, however, if that statute could constitutionally apply to the case at bar, the settlor's property became subject to a tax on this transfer

of a remainderman's interest to his daughter, whether the power of revocation were exercised or not. If he did not exercise the power of revocation he would be taxed, according to the Collector's contention, under Section 402 (c). If he did exercise the power of revocation there was no way in which he could retransfer the property to his daughter, and retain a life interest, without subjecting his estate to a tax.

In other words, if the Collector's contention is sound, a purpose which the settlor had lawfully accomplished in 1903, and which was not taxable when the act was done, had later to be undone under penalty of paying a tax, and if it were undone it could not be reaccomplished by deed or will without liability to a tax. This is the clearest case of a retroactive tax, an effort to impose an inescapable tax on a past lawful untaxed transaction.

The decedent executed his deed of transfer in 1903. He thereupon actually delivered all of the trust property to the trustee. He retained no control of investments or management of the trust; all such control was lodged in the trustee, free from restraint or interference. The trustee continued at all times to hold the trust property to the uses of the trust. The Government cannot alter the fact that there was an effective transfer. It can make laws within constitutional limit, but it cannot make, or avoid the effect of facts. This transfer made in 1903 is the controlling fact in this case. And a transfer lawfully made in 1903, not taxable at that time, cannot be taxed by Congress in 1921.

The argument of the Collector must come down to this. The settlor **could** have revoked his trust—his failure to do so is to be taxed. But an excise tax—a tax on a privilege—cannot be imposed upon inaction. One cannot be **forced** to

do a given act by a tax on the "privilege" of not doing such an act, unless indeed there be a **duty** to perform the act. But there was no **duty** to revoke this trust. The Collector cannot take the position that the settlor **ought** to have revoked the trust and therefore he is to be taxed whether he revokes it or not. Such a position is the bold assertion of the right to impose a direct tax without apportionment, a power not lodged in the Federal Government.

It is worth noting that **all** of the decisions of the lower Federal courts with respect to revocable trusts sought to be taxed under the retroactive clause of Section 402 (c) of the 1918 and 1921 Acts hold that the retroactive clause cannot constitutionally be applied to such trusts. Those decisions are:

Stark v. *United States*, *supra*, 24 Fed. (2nd) 237 (Dist. Ct. S. D. Ohio, W. D. 1927);

Hall v. *Nichols*, *supra*, 18 Fed. (2nd) 139 (Dist. Ct. D. Mass. 1927);

Reinecke v. *The Northern Trust Co.*, *supra*, 24 Fed. (2nd) 91 (C. C. A. 7th Cir. 1927);

The Farmers' Loan and Trust Co. v. *Bowers*, *supra*, decided by C. C. A. 2nd Cir. Nov. 12, 1928, and not yet reported; reversing the District Court decision reported in 15 Fed. (2nd) 796.

(b) **The reasoning on which Section 402 (c) of the 1921 Act might be sustained as applied to subsequent transfers shows its invalidity as applied to the 1903 transfer.**

In *Nichols* v. *Coolidge*, *supra*, this Court expressly held open the question of the constitutionality of the Act as applied to transfers made **after** its passage, saying (p. 542):

> "Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider".

Since the transfer involved in the case at bar was made long prior to the enactment, the question thus held open by this Court does not now arise; we are therefore not arguing at this time the broad question of the constitutionality of Section 402 (c) as applied to subsequent transfers.

It is significant, however, that in *Nichols* v. *Coolidge*, this Court indicated the reasoning upon which the Act, as to subsequent transfers, might be sustained,—reasoning which cannot by any possibility sustain the tax on the 1903 trust. The Court said (p. 541):

> "Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. **This is necessary to prevent evasion and give practical effect to the exercise of admitted power but the right is limited by the necessity.**"

Clearly there could have been no intent to evade the Federal estate tax laws by a transfer effectively made in 1903—13 years before any such law had been enacted. An intent to evade cannot exist under such circumstances. A tax upon such a transfer is a bald effort at a direct tax levied without an apportionment, a mere arbitrary and capricious classification unjustified and unrelieved by any reasonable relation to or assistance in the exercise of constitutional power.

POINT III.

The Saltonstall case and others which may be relied upon by the Government are inapplicable.

(a) In view of the rule of *Hill* v. *Wallace, supra*, page 11, the *Saltonstall* case is not in point.

The decision in *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (1928), is not in point in the light of the principles and authorities discussed in Point I of this brief. In deciding the *Saltonstall* case, this Court was not concerned with the rule of *Hill* v. *Wallace*. The question in the *Saltonstall* case was whether a Massachusetts statute, which had been upheld by the Massachusetts Court as applied to the facts before it, was valid under the Fourteenth Amendment. This Court affirmed the Massachusetts decision. There had not been, as in the case at bar, a previous decision by the Massachusetts Court or any other court holding the statute or (as here) the very clause in question to be unconstitutional. It was therefore not necessary, in order to uphold the tax in that case, for this Court to separate situations which the Legislature had failed to separate or in effect to rewrite the statute, as this Court would be required to do in the case at bar in order separately to classify revocable and irrevocable trusts and to exempt the one while sustaining the tax on the other. In the *Saltonstall* case, it was held that on the facts before the Court, the statute did not run counter to the Fourteenth Amendment; and that was all. In the case at bar, this Court is asked to apply a clause (the retroactive clause) which it has already held in *Nichols* v. *Coolidge* to be null and void, and the Court is asked to do this in the face of the unity and indivisibility of that clause.

This is an entirely different situation from that which came before the Court in the *Saltonstall* case and completely distinguishes that case from the present one. It is submitted that the rule of *Hill* v. *Wallace*, applied in the numerous other decisions cited under Point I of this brief, governs this case and requires a decision in favor of the plaintiff with respect to the 1903 trust.

(b) The *Saltonstall* case is distinguishable from the case at bar in that the tax involved in the *Saltonstall* case was a tax on the privilege of succession, whereas the tax involved in this case is a tax on the privilege of transmission.

The decision of the United States Supreme Court in *Saltonstall* v. *Saltonstall*, 276 U. S. 260 (1928), involved the same trust that was involved in *Hill* v. *Nichols*, *supra*, 18 Fed. 139 (1927). In the *Saltonstall* case this Court held that the Commonwealth of Massachusetts had power to levy an inheritance tax on the receipt of trust property by the beneficiaries at the death of the settlor, whereas in the *Hill* case the District Court denied any power in the Federal Government to subject the transfer to the Federal estate tax.

In *Hill* v. *Nichols*, Judge Brewster said (page 141):

> "The power of revocation has no effect upon the validity of the trust or the rights of the trustee, if the power is never exercised. • • • As stated above, I am unable to distinguish this case, in principle, from *Coolidge* v. *Nichols*, *supra*, [4 F. (2d) 112] and I am compelled to the same conclusions reached in that case."

The different results in the two cases are explained by the difference in the nature of the two statutes. The Fed-

eral estate tax is levied upon the right to **transmit or transfer** while the state inheritance tax is levied upon the right to **receive or succeed** to property. Mr. Justice Stone recognizes this distinction and makes it the basis of his opinion in the *Saltonstall* case (p. 270):

> "In *Nichols* v. *Coolidge* it was held that under the estate tax sections of the Revenue Act of 1919—which tax the privilege of transmission, *Nichols* v. *Coolidge, supra; New York Trust Co.* v. *Eisner*, 256 U. S. 345—property of which a donor had made an outright conveyance several years before the enactment of the statute could not, on his death after its enactment, be included as part of his taxable gross estate at its value at the time of his death. But we are here concerned, not with a tax on the privilege of transmission, not with an attempt to tax a donor's estate for an absolute gift made when no tax was thought of, and to do so at the probably appreciated value which the gift now bears, but with a tax on the privilege of succession, which also may constitutionally be subjected to a tax by the state whether occasioned by death, *Stebbins* v. *Riley, supra*, or effected by deed, *Keeny* v. *New York*, 222 U. S. 525, *Chanler* v. *Kelsey, supra*, *Nickel* v. *Cole, supra*. The present tax is not laid on the donor, but on the beneficiary; • • •."

The necessity of keeping in mind the distinction between a tax upon the right to **receive** and a tax upon the right to **transmit**, the Federal estate tax being of the latter class, is thus stated by Chief Justice White in *Knowlton* v. *Moore*, 178 U. S. 41, at page 77 (1900):

> "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight point-

> ed out by Hanson in a passage which we have heretofore quoted; that is, **it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.**"

In *Frick* v. *Lewellyn*, 298 Fed. 803 (District Court, Western District of Pennsylvania, 1924), the Court said with respect to an effort to include in the gross estate life insurance policies which had been assigned by the decedent with a power of revocation retained (pages 810-11):

> "**Estate excise taxes are based on the power to transmit or the transmission from the dead to the living, while legacy or inheritance taxes are based on the transmission or the right to receive the property in question.**"

The case of *Matter of Schmollapp*, 236 N. Y. 278 (1923) is similar in all essential respects to the *Saltonstall* case. Both cases involved a State inheritance tax act. The New York tax, like the Massachusetts tax, is an inheritance tax, as distinguished from an estate tax. Although the inheritance tax (both New York and Massachusetts) is payable in the first instance by the executor, the tax is separately computed with respect to each legacy and trust, and is deductible from and reimbursable by such legacy or trust. [New York Tax Law, §§230, 224; Massachusetts General Laws (1921) c. 65 §7.] Arbitrary classification is avoided in the New York Tax Law as in the Massachusetts Act by according to the executor a right of reimbursement for the tax paid in respect of the trust. The New York tax, as well as the Massachusetts tax, is computed with regard to the amount of the trust and the relationship of the donees to the donor, and it is ultimately paid by the trust. It is a very

different thing, however, to tax finally and without reimbursement the donor's estate in respect of a transfer made many years previously, on an ascending scale, and at the value in 1922 of property transferred in 1903. If the contention of the Collector is sound, the Federal estate tax in a given case might be so large as to exhaust the entire estate of the donor. Under the New York and Massachusetts statutes under construction in *Matter of Schmidlapp* and *Saltonstall* v. *Saltonstall*, the executor's right of reimbursement from the trust makes such a result impossible.

The same trust which was involved in the *Schmidlapp* case was held in *Stark* v. *United States*, *supra*, 24 F. (2nd) 237, not to be taxable under the Federal estate tax law. In that case, Judge Hickenlooper, in the Federal District Court in Ohio, followed *Nichols* v. *Coolidge*, and said at page 238:

> "We are also of the opinion that the retention of a life interest in the income of the securities by the donor, of his control of investments and management of the trust, and of his right to change the trustee, considered either separably or in connection with the power of modification, alteration, and revocation, do not negative or prevent the actual creation of the trust, or the fact that at the death of the donor the property so transferred and conveyed in trust passed under the deed of trust the interests which were created in 1915. *Nichols* v. *Coolidge* **specifically calls attention to the difference between excise taxes upon the right to become beneficially entitled to property and an excise upon the transfer of property by death. The federal estate tax law is of the latter sort**"

Respectfully submitted,

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October Term 1928.

No. 90.

MABEL G. REINECKE, Collector of Internal Revenue for the First District of Illinois,

Petitioner,

against

NORTHERN TRUST COMPANY, as Executor under the Last Will and Testament of A. C. Bartlett, Deceased.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF EDWARD H. BLANC AND RUSSELL L. BRADFORD AS AMICI CURIAE AND ON BEHALF OF THE FARMERS' LOAN AND TRUST COMPANY, TRUSTEE.

EDWARD H. BLANC,
RUSSELL L. BRADFORD,
Amici Curiae.

HENRY C. ELDERT,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICI CURIAE.

This brief by permission of the Court, and with the consent of counsel for the respective parties, is filed by the undersigned as *amici curiae*, and on behalf of The Farmers' Loan and Trust Company, Trustee, plaintiff in an action now pending in the United States Circuit Court of Appeals for the Second Circuit, and on behalf of the same Trust Company, as Trustee and Executor, plaintiff in other cases now pending in the United States District Court for the Southern District of New York, all of which cases may be directly affected by the decision of this Court in the above entitled matter.

The relevant facts in the case at bar are set out in the briefs of the parties and in the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (24 Fed. (2) 91).

The argument of this brief will be addressed mainly to the 1903 and 1910 trusts, with incidental references to the five trusts created in 1919, and will be directed to the questions drawn in issue upon the following points and in the following order:

> 1. A transfer made prior to death is not rendered subject to the Federal Estate Tax merely because of a reserved power of revocation, whether or not made prior to the enactment of the Statute; and
>
> 2. The retroactive provisions of Section 402(c) having been declared in *Nichols* v. *Coolidge* unconstitutional in respect of certain transfers or trusts intended to take effect in possession or enjoyment at or after death, they are unconstitutional as applied to all such transfers or trusts.

The Tax in Suit is a Death Duty.

The Federal Estate Tax Act of 1921, like the Federal Estate Tax Act of 1918, is not a transfer, succession, legacy, or inheritance tax, but an estate tax. It is imposed, not upon the coming into or the right to come into possession of property, nor upon any legacy, right of succession or right of inheritance, but solely upon the transfer of property at death. *New York Trust Company* v. *Eisner*, 256 U. S. 345 (1921); *Greiner* v. *Lewellyn*, 258 U. S. 384 (1922); *Y. M. C. A. of Columbus, Ohio* v. *Davis*, 264 U. S. 47 (1924); *Edwards* v. *Slocum*, 264 U. S. 61 (1924); *Nichols* v. *Coolidge*, 274 U. S. 531 (1927).

As Chief Justice Taft in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, at p. 50, puts it:

> "What was being imposed here was *an excise upon the transfer of an estate upon the death of the owner. It was not a tax upon succession and*

> *receipt of benefits under the law or the will.* It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death. *Knowlton* v. *Moore*, 178 U. S. 41, 48, 49 * * *". (Italics ours).

Again, this Court through Mr. Justice Holmes in *Edwards* v. *Slocum*, 264 U. S. 61, 62, said of the statute in suit:

> "It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, *but the interest which ceased* by reason of the death'." (Italics ours).

The above propositions form the premise underlying and expressly recognized in the decisions of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531, and *Shukert* v. *Allen*, 273 U. S. 545, 547, and of the United States Circuit Court of Appeals for the Second Circuit in *Frew* v. *Bowers*, 12 Fed. (2d) 625, 626 (1926), cited with approval by this Court in the *Coolidge* case.

POINT I.

A transfer made prior to death is not rendered subject to the Federal Estate Tax merely because a power of revocation is reserved, whether or not made prior to the enactment of the statute.

The contention of the Government that the transfers in this case are subject to the Federal estate tax because of the reserved power to revoke the trust instrument rests, and must rest, upon one of the following arguments:

(1) That the statute reaches back to impose a tax retroactively upon a transfer made prior to its enactment; or

(2) That the transfer is not itself subject to the tax but that the fund transferred is used only to measure the amount of the tax upon such property as is in fact transferred at death; or

(3) That the transfer while complete at the time of transfer became for some reason testamentary in character because of the reserved power to revoke and that it therefor falls within the statute; or

(4) That while there was a transfer it was incomplete until death because of the reserved power to revoke.

Let us now analyze the above four bases.

(1) The first of them may be eliminated at once because this Court in *Untermeyer* v. *Anderson*, 276 U. S. 440, (1928) has definitely held that an excise may not be imposed upon a transfer complete prior to the enactment of the Act. See also *Nichols* v. *Coolidge*, 274 U. S. 531, and *Blodgett* v. *Holden*, 275 U. S. 142 (1928).

(2) The second is likewise untenable as this Court in *Nichols* v. *Coolidge*, *supra*, has decided. To the same effect is *Frew* v. *Bowers*, 12 Fed. (2d) 625 (C. C. A. 2nd Cir.). A tax upon the transfer of property must be measured by the value of the property so transferred and by no other property. Any other scheme of taxation would be a violation of the Fifth Amendment as arbitrary and capricious, and in effect confiscation and not the exercise of the taxing power of Congress. *Nichols* v. *Coolidge*, *supra*, and see also *Frick* v. *Pennsylvania*, 268 U. S. 473, (1925) and *Knowlton* v. *Moore*, 178 U. S. 41 (1900); and cf. *Llewellyn* v. *Frick*, 268 U. S. 238 (1925).

(3) A power of revocation does not render a transfer testamentary in fact or in character. (See *Schouler on Wills*, 6th Ed., Vol. 1, p. 406). A will does not until death clothe the legatee named therein with any interest in property. It has no effect of any sort until death. In

fact it is not a will until death. Revocability, as Schouler on Wills (above) expresses it, is not the great criterion of testamentary dispositions, but whether a disposition is or is not testamentary is determinable by whether there is a vesting of any interest prior to death. See *Matter of Diez*, 50 N. Y. 88, 93 (1872). A power to revoke is not a property right nor an interest in property. (*Jones* v. *Clifton*, 101 U. S. 225 (1879); *Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227 (1858); *Stark* v. *United States*, 24 Fed. (2d) 237 (U. S. D. C. S. D. Ohio); *Hill* v. *Nichols*, 18 Fed. (2d) 139 (U. S. D. C., Mass.); *Reinecke* v. *Northern Trust Company*, 24 Fed. (2d) 91 (C. C. A. 7th Cir.); *Farmers Loan & Trust Co.* v. *Bowers* (decided Nov. 12, 1928, C. C. A. 2nd Cir.—unreported as yet); *People* v. *Northern Trust Co.*, 289 Ill. 475 (1919).) The power not being property or an interest in property does not, and may not, pass at death to anyone. It is not transferable, descendable or alienable, nor may it be willed. It is unique and personal to the person or persons in whom it is lodged.

That a power of revocation does not make a transfer testamentary has been held in the domain of the general law as applied (a) to insurance (*Llewellyn* v. *Frick*, 268 U. S. 238, 298 Fed. 803; *Tyler* v. *Treas. & Rec. Gen.*, 226 Mass. 306; *Matter of Voorhees*, 200 App. Div. (N. Y.) 259 (1922)), and (b) to questions concerning the validity of trusts and the completeness of transfers (*Stone* v. *Hackett*, *supra*; *Kelley* v. *Snow*, 185 Mass. 288 (1904); *Nichols* v. *Emery*, 109 Cal. 323 (1895); *Sims* v. *Brown*, 252 Mo. 58 (1913); *Allen* v. *Hendrick*, 104 Or. 202 (1922); *Richardson* v. *Stephenson*, 193 Wis. 89 (1927); *Lee* v. *Belknap*, 168 Ky. 418—1915), and (c)—except where specifically changed by statute—to attacks by creditors (*Jones* v. *Clifton*, *supra*).

The suggestion was made and argued both in the brief and orally in this Court in *Nichols* v. *Coolidge* that

the trust there in suit was testamentary in character, but this Court brushed aside the suggestion with the statement (p. 540):—

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within congressional power."

While it is true that in the *Coolidge* case there was no power to revoke reserved to the grantor, nevertheless the Government contended that the transaction was testamentary in character. In the case of *Lewellyn* v. *Frick*, 268 U. S. 238 (1925) this Court evidently found nothing testamentary in the policies of insurance there involved. These policies were made payable to Mrs. Frick and Miss Frick. In some the insured specifically reserved the power to change the beneficiary. In others this right to change the beneficiary was a part of the policy itself. The power to revoke the insurance given did not render the gifts of the policies testamentary in character or in fact.

Nothing testamentary was found by the Court in transfers or trusts which were subject to revocation in the following cases having to do with the statute in suit: *Reinecke* v. *Northern Trust Company*, case in suit; *Hill* v. *Nichols*, supra (same trust as was involved in *Saltonstall* v. *Saltonstall*, 276 U. S. 260 under a Massachusetts succession tax statute); *Stark* v. *United States*, 24 Fed. (2d) 237 (same trust as was involved in *Matter of Schmidlapp*, 236 N. Y. 278). Nor did the Pennsylvania Court find anything testamentary because of the power to revoke in the trusts in *In re Dolan's Estate*, 279 Pa. St. 582 (1924). The United States District Court for the Eastern District of Pennsylvania in *Fidelity Trust Co.* v. *McCaughn*, 17 Fed. (2d) 605 (1926), involving the 1918

Federal Estate Tax Act which is word for word similar to the statute here in suit, held the trust in the Dolan Estate not to be subject to tax, and therefore not to be testamentary in fact or in character. The decisions of the Courts of New York are to the same effect. (*Matter of Masury*, 28 App. Div. 580, aff'd 159 N. Y. 532 (1899); *Matter of Keeney*, 194 N. Y. 281 (1909) (as to three-fourths) aff'd *sub nom Keeney* v. *New York*, 222 U. S. 525; *Matter of Carnegie*, 203 App. Div. 91, aff'd 236 N. Y. 517 (1923); *Matter of Bowers*, 195 App. Div. 548, aff'd 231 N. Y. 613 (1921); *Matter of Miller*, 236 N. Y. 290 (1923). We think that in *Matter of Schmidlapp*, 236 N. Y. 278, decided the same day as *Matter of Miller*, supra, there existed many elements which deprive that case of force as bearing on the present issue.

It has been directly held that a transaction is not testamentary in character merely because of the reservation of a power to revoke. *Sims* v. *Brown*, 252 Mo. 58 (1913); *Nichols* v. *Emery*, 109 Cal. 323 (1895) and *Robb* v. *Washington & Jefferson College*, 103 App. Div. (N. Y.) 327, 348, 353 (1905), aff'd 185 N. Y. 485, 493 (1906).

(4) The fourth hypothesis, namely, that, because of the reservation of the power to revoke, the transfer is incomplete until the moment of death when the power to revoke is annihilated, is, we submit, equally untenable. The proposition itself is a denial of the *fact of transfer*. See *Stark* v. *United States*, 24 Fed. (2d) 237, 238. If the transfer is incomplete there has been no transfer. It is obvious that a revocation must operate upon a transfer that has been made. We take it that this is self-evident. A clear exposition of the principle that the transfer is complete and the trust valid notwithstanding the power of revocation, is set out in the opinion of Mr. Justice Field in the decision in *Jones* v. *Clifton*, supra, where it is said at pp. 229-230:—

> "*The powers of revocation and appointment to other uses reserved to the husband in the deeds*

> *in question do not impair their validity or their efficiency in transferring the estate to the wife*, to be held by her until such revocation or appointment be made. * * * *The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will.*" (Italics ours).

One of the outstanding cases is *Stone* v. *Hackett*, supra, where the Massachusetts Court said at p. 232:

> "It was suggested by the learned counsel for the widow that the donor never parted with his power or dominion over the property because he retained a right to annul or revoke the trust, *but this seems to us quite immaterial.* A power of revocation is perfectly consistent with the creation of a valid trust. It does not in any degree affect the legal title to the property. *That passes to the donee and remains vested for the purposes of the trust, notwithstanding the existence of a right to revoke it.*" (Italics ours).

And when we come to the domain of death duties and inheritance taxes we find the law settled and definite. This is true under statutes imposing transfer taxes or succession and legacy taxes, and *a fortiori* true where there are estate taxes.

The New York Courts have held that the mere reservation of a power to revoke is immaterial in the determination of whether or not the transfer tax imposed under the New York statute may be applied to transfers made prior to death. *Matter of Masury*, 28 App. Div. 580, aff'd 159 N. Y. 532; *Matter of Keeney*, 194 N. Y. 281 (as to three fourths) aff'd sub nom *Keeney* v. *New York*, 222 U. S. 525; *Matter of Carnegie*, 203 App. Div. 91, aff'd 236 N. Y. 547; *Matter of Votichenko*, C. C. H. N. Y. Tax Service for July 25, 1928; *Matter of Cochrane*, 117 Misc. 18 (1921), aff'd without op. 202 App. Div. (N. Y.) 751;

Matter of Isaac Wing's Estate, 190 N. Y. Supp. 908 (1921), in all of which cases there was an absolute power to revoke. *A fortiori* was the power of revocation held to be immaterial in the determination of the issue presented where the power to revoke was dependent upon the consent of one or more of the trustees. *Matter of Bowers*, 195 App. Div. 548, aff'd 231 N. Y. 613.

In *re Dolan's Estate*, 279 Pa. St. 582, the discussion of the Court is so clear and definite, we think it not inappropriate to quote at length from the opinion (p. 589):

> "The estate in the children was fixed and definite. The *annexation of the power of revocation does not affect the grantee's power of enjoyment or prevent the sale of the property privately or judicially*, though the grantee takes the estate with the possibility of its being divested by the happening of an uncertain event, to wit, the exercise of the power of revocation. Through the exercise of that right reserved the property may be recalled. But the right to revoke, unexercised, is a dead thing. Its presence in a deed does not alter the character of the instrument or estate granted; to all intents and purposes, title and possession pass just as effectively as any deed or grant could make it, continuing in that state so long as the power of revocation lies dormant. * * * *

> *How, then, could the extinguishment of the power to revoke the deed of trust by the death of Mrs. Dolan—that is all death accomplished,—work a transfer of property? The right of revocation, standing alone, is not tantamount to a property right in the settlor; it possesses none of the attributes of property.* Mrs. Dolan did everything possible in 1908 to divest herself of the specific property. When she died in 1920 there was nothing for her, the law, or any one to do to complete the act. *Revocation is neither an estate nor property and cannot pass at death.*"

The decisions of the Illinois Courts are to the same effect. See *People* v. *Northern Trust Co.*, 289 Ill. 475.

Under the statute in suit the lower Federal courts have held transfers not to be subject to tax where there was a power to revoke reserved to the settlor. See decision in case in suit by Circuit Court of Appeal, and *Stark* v. *United States*, 24 Fed. (2d) 237, and *Fidelity Trust Co.* v. *McCaughn*, 17 Fed. (2) 605, 607, where there was an absolute power to revoke. See also *Hill* v. *Nichols*, 18 Fed. (2d) 139, and *Farmers Loan & Trust Co. etc.* v. *Rogers* (decided by C. C. A. 2nd Cir. Nov. 12, 1928—unreported as yet), where the power to revoke could be exercised only with the consent of one or more of the trustees. In the latter case Judge Manton speaking for a unanimous Court in reversing the Court below said in respect of powers of revocation:—

> "A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2d) 139; *Reinecke* v. *Northern Trust Company*, 24 Fed. (2d) 91; *In re Dolan's Estate*, 279 Pa. St. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it. The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence or effect of that which may perhaps thereafter be brought to an end for the reason that the enjoyment and possession actually passes to the beneficiaries. Until the right to revoke is exercised an estate exists by virtue of the transfer. *People* v. *Northern Trust Co.*, 289 Ill. 475; *In re Dolan's Estate*, *supra*. Such a power is not transferable or descendable nor may it be alienated or passed by a will. It is personal to the holder. *Lewellyn* v. *Frick*, 268 U. S. 238; *Jones* v. *Clifton*, *supra*; *Reinecke* v. *Northern Trust Co.*, *supra*. When in May, 1916, the settlor made his indenture, he transferred his

> title and also all possession and enjoyment. His reserved powers were not conditions of the vesting of the estate, but merely conditional limitations."

We submit, moreover, that if the trust was created and the transfer made prior to the enactment of any Federal Estate Tax Act, as is true of the 1903 and 1910 trusts in suit, the power of revocation has no part in the determination of whether the transfer may be subjected to the Federal estate tax. The sole question in issue in such a case, we submit, is whether the Government is not foreclosed from imposing the tax in suit by the decision of this Court in *Nichols* v. *Coolidge*.

It is clear that the tax may not be sustained if it be imposed upon a transfer completed prior to the enactment of the Act. It is equally clear that it may not be sustained if the tax is not imposed upon the transfer of the property composing the corpus of the 1903 and 1910 trusts here in suit but is imposed upon the estate of A. C. Bartlett measured by those trusts. It is likewise equally true that the mere power of revocation reserved does not render the transfers testamentary in fact or in character. This is indubitably so when we take into consideration the fact that the tax is upon the transfer of property at death, and is not imposed upon transactions already complete merely because—if indeed that be arguable—there may be present some elements which may also be present in testamentary dispositions. It is no less true that the transfer is not rendered incomplete if otherwise complete, merely because of a reserved power to revoke.

In Respect of the Five 1919 Trusts.

We submit that these five trusts are certainly not within the statute. No income was reserved to the grantor in any of the trusts created in 1919. While there

was reserved a limited power to revoke the trusts if, and only if, the consent of a majority of the beneficiaries of the five trusts could be obtained (and in each of the five trusts there was a separate beneficiary), this was not a power of revocation at all but in effect was nothing more than a power to ask permission of the beneficiaries to revoke the same, which permission or consent had to be given by a majority thereof. The settlor so bridled his rights in respect of the trusts that the reins did not rest in his hands but in the hands of the beneficiaries. In other words revocability was a matter ultimately for the act of parties other than the settlor. As no income is reserved and as a power of revocation is immaterial these five trusts are not within the purview of Section 402(c) of the Revenue Act of 1924, under any rule.

POINT II.

The retroactive provisions of Section 402(c) having been declared in Nichols v. Coolidge unconstitutional in respect of certain transfers or trusts intended to take effect in possession or enjoyment at or after death those provisions are unconstitutional as applied to all such transfers or trusts.

Section 401 of the statute imposes the tax. The germane parts of Section 402 provide:—

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wheresoever situated. • • •
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or

> after his death *(whether such transfer or trust is made or created before or after the passage of this Act)*, except in the case of a bona fide sale for a fair consideration in money or money's worth. • • • "

This section has application to all transfers made or trusts created intended to take effect in possession or enjoyment at or after death. There are no classifications or gradations of such transfers or trusts.

The Courts may not, under well settled rules, specifically apply the retroactive provision to some species of such transfers or trusts to the exclusion of others when the language of the statute is general in scope and purpose and not specific. This doctrine is laid down with clarity in *Batts* v. *Merchants Transportation Co.*, 230 U. S. 126 (1913), where this Court expressed the rule in the following language at p. 135:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."

The decision of this Court in *Nichols* v. *Coolidge*, *supra*, has held that the retroactive provisions of Section 402(c) are unconstitutional when applied to transfers made or trusts created prior to the enactment of any Federal Estate Tax Act even if the transfers or trusts were intended to take effect in possession or enjoyment at or after the death of the settlor. We take it that as the retroactive part of the statute is therefore unconstitutional, it is unconstitutional in respect of its application to *all* trusts or transfers made prior to the enactment of the law.

There is no other section or provision of the statute that may be called into play for the purpose of upholding

a tax upon a past transfer. (See opinion of Sanborn, J., in *Chicago, Milwaukee & St. Paul Ruw. Co.* v. *Westby*, 178 Fed. 619, 629—C. C. A. 8th Cir.—1910; *Baldwin* v. *Franks*, 120 U. S. 678, 685—1887; *Hill* v. *Wallace*, 259 U. S. 44, 70, 71—1922; *United States* v. *Reese*, 92 U. S. 214, 221—1875.)

To construe Section 402(c) of the 1921 Act in the light of the decision of this Court in *Nichols* v. *Coolidge* so as to make it applicable to the case in suit necessarily involves the exclusion of certain kinds of transfers and trusts such as irrevocable trusts from the operation of the statute. The question presented in determining whether a statute is partly enforceable after having been held partly invalid is one "of interpretation and legislative intent". *Dorchy* v. *Kansas*, 264 U. S. 286, 290 (1923). What did Congress intend in enacting Section 402(c) with the retroactive provision? Did it intend the retrospective operation of the section to *apply only* to trusts wherein there was a power of revocation, or does the section apply to all trusts or transfers made prior to the enactment of the law?

The rule of construction, and the doctrine of searching for the intention of the legislative branch of Government must be determined from the language used. If upon striking out the invalid part the remainder may be held valid, and the Court can find that the legislative body intended the valid part to stand, then that will be done. If the intention to legislate as to the remainder cannot be found from the language of the law or its context, then the whole statute falls. *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, 636 (1894); *Baldwin* v. *Franks*, *supra*.

If both a valid part and an invalid part are dependent upon the same words as in *Butts* v. *Merchants Transportation Co.*, *supra*, and *Hill* v. *Wallace*, *supra*, they may not be separated and no part is valid. To render any part

valid the Court must look to other sections or provisions of the law. If there be none then the law is invalid in all its parts. (*Butts* v. *Merchants Transportation Co., supra; Hill* v. *Wallace, supra; United States* v. *Reese, supra; Chicago, Milwaukee & St. Paul Ruy. Co.* v. *Westby, supra*, and see opinion in *Roberts* v. *Atlantic Oil Producing Co.*, 295 Fed. 16 (1924) (certiorari denied 265 U. S. 582).)

If the elision of the invalid provision is necessary to uphold the remainder, the law may not be sustained as to this remainder by the courts adding limitations or new and additional words, or construing the statute as though words not in the statute are to be assumed to be there. (*See Roberts* v. *Atlantic Oil Producing Co., supra; Butts* v. *Merchants Transportation Co., supra*). This rule is clearly expressed in the opinion of Chief Justice Taft in *Hill* v. *Wallace, supra*, at pp. 70-71, where he quotes with approval from the decision of this Court through Chief Justice Waite in *United States* v. *Reese, supra*, (p. 221):

> "'We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be obtained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* Each of the sections must stand as a whole, or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. * * * *To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one.* This is no part of our duty'."

Again, the Circuit Court of Appeals of the Sixth Circuit in *Roberts* v. *Atlantic Oil Producing Co., supra,* at p. 18 states the doctrine in the following summary:—

> "From a review of all the Supreme Court decisions, we think it may safely be said, * * * that if we find that a mere elision of those words, or even sections, which give an unconstitutional effect, will leave a consistent and workable act, this remainder will be held valid; while if * * * modifications or limitations must be inserted or understood, to avoid the fatally broad effect of the statutory language, the whole act must fail. *In other words, we may strike out the excess, but may not add a limitation.*"

When Congress Wished to Tax Revocable Trusts It Did So by Definite Provision.

The intention of Congress best may be ascertained by looking at subsequent Acts of Congress. The Congress for the first time in the Revenue Act of 1924, effective June 2nd, 1924, indicated an intention to apply the Federal Estate Tax to transfers or trusts wherein there was reserved a power of revocation. Section 302(c) of the Revenue Act of 1924 is the counterpart of Section 402(c) of the Act in suit. But the 1924 Act in Section 302(d) made provision for the taxation of transfers or trusts subject to a power to revoke, a provision not in any of the earlier Acts. That Section provides:—

> "(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of

> his death, except in case of a bona fide sale for a fair consideration in money or money's worth."

When the Congress had an intention to single out specifically trusts or transfers subject to revocation it did so. It cannot be presumed that that intention existed until it was expressed. The new provision is to be treated as a new law, and not as a clarification of the old statutes. *Shwab* v. *Doyle*, 258 U. S. 529, 536 (1922), and the cases decided with it. See also *United States* v. *Field*, 255 U. S. 257 (1921).

If the unconstitutional language in Section 402(c) of the statute in suit is stricken from the section then the law may not be construed as retrospective in operation. The Act would be exactly as the 1916 Act was, and that Act was construed by this Court as not retroactive. *Shwab* v. *Doyle, supra; Union Trust Co. of San Francisco* v. *Wardell*, 258 U. S. 537 (1922); *Levy* v. *Wardell*, 258 U. S. 542 (1922); *Knox* v. *McElligott*, 258 U. S. 546 (1922).

We submit that the decision of this Court in *Nichols* v. *Coolidge*, forecloses the case in suit in respect of the 1903 and 1910 trusts. Other than Section 402(c) there is no provision or section of the law applying to past transfers—and this part of the law applying to past transfers has been held unconstitutional in respect of irrevocable trusts and transfers. The Courts may not uphold taxability of past revocable trusts and leave free of the tax past irrevocable trusts when one clause of the law applies to both or all past transfers or trusts. The intention of Congress is reflected in its subsequent Acts, and that intention so expressed subsequently may not be attributed to earlier Acts when it was not expressed. If the unconstitutional part is elided (or stricken out) no past transfers or trusts are amenable to the taxing statute as construed by this Court. The Court will not add words to render the transaction taxable when with-

out the words the transaction is not covered by the net of the provisions of the statute. The Court will not, as we understand the rule, enact or make a law that the Congress has not made.

POINT III.

The decision of the Courts below should be affirmed.

Respectfully submitted,

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